UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LAWRENCE E. WILSON, WARDEN, SAN QUENTIN PENITENTIARY, ET AL., Respondent-Appellant, vs. HOWARD REAGAN, Petitioner-Appellee.	No. 20247

APPELLANT'S OPENING BRIEF

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JURISDICTION

The jurisdiction of the United States District Court to issue the writ of habeas corpus was conferred by Title 28, United States Code section 2241. The jurisdiction of this Court is conferred by Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Northern District of California, Southern Division, granting appellee's

petition for writ of habeas corpus and ordering his discharge from state custody. The state has appealed.

Proceedings in the State Courts.

On August 4, 1958, the appellee, Howard Reagan, petitioner below, was charged by a criminal complaint filed in the Justice Court of the Merced Judicial District, County of Merced, with armed robbery in violation of section 211 of the California Penal Code. Two others were similarly charged. On that date, appellee and his codefendants were arraigned in the justice court, the complaint was read, and appellee was informed of his rights (CT 28, 67, 82).*

On August 5, 1958, the proceedings were suspended and appellee was certified to the juvenile court. Ibid. Thereafter, on August 21, 1958, the probation officer filed a petition for hearing, together with his report and recommendation, in the juvenile court (CT 84-86). On August 25, 1958, after a hearing at which appellee was present, the juvenile court declared appellee unfit for treatment as a juvenile and remanded him for

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* As hereinafter used, "CT" refers to the transcript of record filed in this Court, constituting the United States District Court Clerk's record on appeal. "RT" will refer to the Reporter's Transcript filed in this Court, constituting the transcript of proceedings at the evidentiary hearing conducted before the District Court.

criminal proceedings (CT 87-88). Appellee was then taken before the justice court and a preliminary examination was set for September 16, 1958 (CT 28, 67, 82).

On September 11, 1958, appellee appeared before the justice court and was represented by the public defender. Appellee there waived reading of the complaint, waived being informed of his legal rights, and waived preliminary examination, and the court thereupon ordered him held to answer to the charge in the superior court (CT 82).

On September 15, four days after his waiver of preliminary examination, appellee appeared in the Superior Court of Merced County for arraignment on the information charging him with armed robbery (CT 29-31, 69, 89-90). Appellee there continued to be represented by the public defender.

At the outset of the arraignment, the court furnished appellee with a copy of the information charging him with armed robbery. The public defender waived reading of the information on behalf of appellee (CT 90). Appellee then personally entered a plea of guilty to the charge of armed robbery contained in the information (CT 31-32, 69-70, 90-91).

Appellee next personally waived time for a

probation report and requested immediate sentence, the public defender stated there was no legal cause why sentence should not be pronounced, and the court thereupon sentenced appellee to the state prison for the term prescribed by law (CT 32-34, 70-72, 91-93).

Appellee did not appeal his conviction. Only after his return to state prison upon revocation of parole, almost six years after conviction, did he for the first time attempt to challenge the legality of his detention. In 1964 he filed petitions for habeas corpus in the Superior Court of Marin County, and the Supreme Court of California. Both of these petitions were denied (CT 7, 52).

Proceedings in the Federal Court.

On January 5, 1965, almost seven years after his conviction, appellee filed an application for writ of habeas corpus in the United States District Court, Northern District of California, Southern Division (CT 1). On the same date an order to show cause was issued (CT 20). Appellant, respondent below, filed a return to the order to show cause on January 18, 1965 (CT 21). On January 26, 1965, appellee, in propria persona, filed a traverse to the return to the order to show cause (CT 36). After counsel for appellant appeared before the District Court on February 4, 1965, and argued in support of the return

to the order to show cause, the matter was ordered submitted (CT 122).

Thereafter, on February 25, 1965, the District Court appointed counsel to represent appellee in further proceedings before the court (CT 47). Counsel filed an amended traverse to the return to the order to show cause on April 2, 1965. Upon consideration of all the papers before it, the court ordered that an evidentiary hearing be held (CT 48, 76).

The hearing was conducted before the District Court on April 29, 1965 (CT 122). On July 7, 1965, the court granted the writ of habeas corpus and ordered appellee discharged from appellant's custody. The order was stayed for a period of ten days (CT 97-111). The court concluded that appellee was entitled to discharge because it found that the representation afforded him in the state courts was constitutitonally inadequate (CT 111).

On July 19, 1965, a certificate of probable cause was issued by the Honorable George B. Harris, Chief Judge of the United States District Court for the Northern District of California, Southern Division, and on that same date a notice of appeal was filed (CT 116, 118).

STATEMENT OF FACTS

From the preliminary examination stage of the proceedings in the justice court to his arraignment on the

information, plea, and sentencing in the superior court, appellee was represented by Donald R. Fretz, the Public Defender of Merced County. At that time, Mr. Fretz had served as public defender for approximately four years. In 1963 he was appointed Judge of the Superior Court of Merced County, which position he held at the time of the evidentiary hearing and still holds (RT 65-66).

Appellee's contentions and evidence.

Appellee's contentions are contained in his Petition for Habeas Corpus, Traverse and Amended Traverse to the Order to Show Cause, and Affidavit attached thereto. Essentially, his contention is that he was never represented by counsel during proceedings against him in the state courts, except during sentencing proceedings on September 15, 1958, and he dismisses that representation as merely pro forma (CT 4, 16).

Appellee's specific allegations are extreme. Thus, he charges that he never had the opportunity to consult with an attorney concerning the felony charged against him (CT 4, 39, 64, 65). Further, he declares that he was never informed of his legal rights (CT 6), although with respect to the proceedings in the justice court on August 4, 1958, he can only admit that he cannot recall then being informed of his legal rights (CT 64).

Likewise, with respect to the proceedings in

the justice court on September 11, 1958, appellee can only admit that he cannot recall the public defender being present, and he frankly states that he has "no idea what took place on that day." (CT 65).

Appellee both recognizes and recalls that the public defender was present in the superior court on September 15, 1958, for arraignment on the information, plea, and sentence. But he claims that he had never seen the public defender prior to that time, and did not then have the opportunity to discuss his case with him (CT 5-6).

Appellee further claims, without elaboration or specific factual allegation, that he believed he had a good defense. But he complains he did not have the opportunity to discuss any possible defenses with counsel (CT 12, 13, 15). He contends that he entered a guilty plea because of representations made to him by police officers that he would be treated as a juvenile (CT 4, 12). He further states that he "elected to plead guilty" because he felt "overwhelmed by the seemingly overpowering resources of the state," and because he felt "woefully ill-equipped to prepare his defense," without effective assistance of counsel (CT 42).

Appellee testified that upon his arrest he "assumed" the charge was armed robbery, but didn't know until questioned by police shortly thereafter (RT 9). He

stated that an officer questioned him for approximately fifteen minutes, and admitted that the officer then told him that the crime charged was a felony and that he would thus have to go through a hearing in superior court (RT 11-12, 35).

Appellee admitted that he then gave a signed statement to the officer describing the robbery in detail, but claimed that the details were supplied by the officer, and denied that he read the statement (RT 13, 32, 41). Although he admitted the officer told him that whatever statement he made could be used against him in court, appellee denied that the officer ever advised him of his right to counsel (RT 32, 34, 40).

Although appellee claimed his statement was improperly induced (CT 4, 12), he admitted the interrogating officer did not promise him anything (RT 32). In fact, he only claimed that the officer explained to him that if he would give a statement and enter a plea of guilty the court could reduce the charge from felony to a misdemeanor. But he admitted the officer did not say that he could accomplish any such reduction. Appellee also claimed that the officer told him that if he did not so cooperate he would be prosecuted as an adult for the felony of armed robbery with which he was charged (RT 33, 43).

Appellee was consistent in declaring that he could not recall what happened during the proceedings in the justice court on August 4, 1958. Consequently, he could not recall that the justice court judge advised him of his legal rights (RT 14, 30-31).

The only thing appellee purported to recall of the proceedings before the juvenile court on August 25, 1958, was that the judge began to read aloud, apparently from the probation officer's report; that he then interrupted and contradicted the judge; and that as a consequence the judge told him and his codefendants to "get out of the room," thus ending the hearing abruptly (RT 15-17).

Similarly, appellee testified that he did not recall the proceedings upon his next appearance in the justice court on September 11, 1958 (RT 30, 36). Thus, he could not recall the public defender then being present in court and could not remember seeing a copy of the complaint charging him with the felony of armed robbery (RT 30:16-19; 36:16-18). Appellee claimed he did not know what he was then in court for; did not know what a preliminary hearing was; had never discussed his case with the public defender or any attorney prior to that time; and in any event, did not knowingly waive the preliminary examination (RT 20, 30).

As to the final proceedings in the superior court on September 15, 1958, when he was arraigned upon the information, entered a plea of guilty to the charge, waived probation officer's report and time for sentencing and was sentenced, appellee claimed that he did not understand that the public defender was present in court on his behalf until after he had entered his plea of guilty. He admitted however, that he knew his appearance in court at that time was for the purpose of sentencing (RT 22).

Appellee further claimed that he entered his plea of guilty to the charge without having consulted with the public defender and knowing neither that the public defender was then in court nor that the public defender was then representing him. It was appellee's testimony that he knew he was represented by counsel only when the public defender spoke to the court on his behalf after the plea of guilty had been entered (RT 23, 26-27, 38).

Appellee claimed he pleaded guilty on the assumption that the charge would be reduced and that he would be returned to the Youth Authority (RT 26); that he realized during the proceeding that things were not going as he expected; and that he knew he "was being railroaded." But he admitted that he made no attempt to

consult with the public defender even when he knew the public defender was representing him at that time (RT 38-39).

Appellee admitted that although he thought he had been "railroaded" in the state courts, he made no complaint to anyone subsequent to sentencing on September 15, 1958, and he waited until 1964 to collaterally attack his conviction (RT 39).

Appellant's contentions and evidence.

As might be expected in an inquiry conducted over six years after the conviction in question, appellant has been required to rely upon available state court records, and, in lieu of any independent recollection, testimony as to customary procedure by those involved in the proceedings against appellee.

The state court records establish that appellee was advised of his legal rights upon his first appearance in the justice court.** Those records also establish that appellee was represented by the public defender both at his waiver of a preliminary examination in the justice court, and in the superior court when he was arraigned

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** The law of this State required that the magistrate's explanation of appellee's legal rights include an explanation of his right to the aid of counsel. Calif. Pen. Code § 859.

In all cases the public defender received his assignment as counsel prior to the date set for preliminary examination. He was at that time also advised of the date set for such examination (RT 71, 72). In every case he contacted his clients and discussed their cases with them prior to the date set for preliminary examination. His preliminary discussions with a defendant consisted of examining the complaint received by the defendant from the justice court; discussing the truth of the allegations contained therein; listening to the defendant's story, including any reasons why he felt he was not guilty or whether in fact he was guilty or not; and discussing with the defendant his right to trial, the nature of the preliminary examination, and what would be done at that time (RT 73-74).

The public defender explained the circumstances underlying the minute entries indicating that appellee appeared before the justice court and waived preliminary examination on September 11, 1958, instead of appearing on September 16, as had been calendared. The early appearance was an indication that upon discussing the charges with appellee, the public defender was given to understand that appellee acknowledged his guilt of the crime charged and wished therefore to waive the preliminary examination in the case. In fact, there would have been

no such early appearance unless the public defender had indicated to the justice court appellee's desire to waive the preliminary examination calendared for the later date (RT 75-77). Judge Fretz categorically denied that he had ever proceeded to a preliminary examination or ever waived a preliminary examination without first discussing the case with the defendant in the manner described (RT 76-77, 82-83).

The customary practice of the justice court judge was also described insofar as it related to the proceedings against appellee. Relative to the proceedings on August 4, 1958, Judge Fretz testified that it was the custom of the justice court judge in each case upon arraignment on the complaint to advise defendants of their rights, including their right to counsel, and that if the defendant expressed a desire for counsel the court would then appoint the public defender (RT 71).

Relative to the proceedings on September 11, 1958, Judge Fretz testified that the practice of the justice court, when a defendant indicated a desire to waive preliminary examination, was to question the defendant personally to insure both that he was doing exactly what he desired and that he understood clearly the expected course to be followed after taking such action (RT 77-78). During proceedings in the justice

court the public defender would necessarily be within four feet of any defendants whom he represented (RT 79-80).

Respecting the proceedings in the superior court on September 15, 1958, Judge Fretz declared that it was the practice for defendants to be brought into the courtroom sometime prior to commencement of the proceedings. Customarily, he too arrived early. In lieu of any independent recollection of the proceedings he could only testify that many times he utilized that opportunity to confer with defendants whom he represented (RT 101-102). A reading of the information was waived because the language used in an information was invariably the same as had been used in the complaint which had already been discussed with the defendant (RT 78).

Judge Fretz explained his acquiescence in the superior court's denial of probation by pointing out that the judge had already considered a probation officer's report in connection with the earlier juvenile court hearing, and had decided then that appellee was not a fit subject for treatment as a juvenile. He stated that at the time of the proceedings in superior court he was aware of the then recent amendment to California law which allowed probation when a conviction involved the use of a deadly weapon providing unusual circumstances were

found to exist (RT 100). However, he testified that because he then knew appellee to be a parolee from the Youth Authority, he knew also that such "unusual circumstances" as are necessary under California law in order to justify consideration for parole for one convicted of armed robbery were precluded (RT 81-82).

Lastly, the former public defender stated that he was fully aware at the time of the proceedings in the superior court on September 15, 1958, that appellee was a juvenile and had been earlier remanded from the juvenile court (RT 96, 98, 99-100, 105).

SUMMARY OF APPELLANT'S ARGUMENT

This appeal is taken on the grounds set forth in the Statement of Points filed in this Court on August 16, 1965. It is appellant's contention that because the record fails to support appellee's allegations, the District Court erroneously held that the representation afforded appellee by the public defender was constitutionall inadequate. Second, appellant contends that because the District Court relied heavily upon the performance of the public defender relative to sentencing, it was error, having concluded that his representation of appellee was inadequate to invalidate appellee's conviction and order his discharge from custody.

I

THE DISTRICT COURT ERRONEOUSLY HELD THAT THE REPRESENTATION AFFORDED APPELLEE BY THE PUBLIC DEFENDER WAS CONSTITUTIONALLY INADEQUATE.

On the basis of the record now before this Court, the District Court concluded that "throughout [the proceedings in the state courts], the representation afforded petitioner was constitutionally inadequate." (CT 111). This constitutes a serious charge against the professional conduct of the public defender appointed to represent appellee. The conclusion of the District Court is not warranted by the record.

The District Court relied upon the criteria set forth in Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962), as the standard against which it measured the merits of appellee's contentions. In reaching the conclusion that the representation afforded appellee failed to satisfy that standard, the District Court erroneously resorted both to speculation and to treatment of silence of the record, in proceedings where silence is expectable, as affirmative evidence in support of appellee's contentions.

A. The record does not support the conclusion of the District Court that the criteria set forth in Brubaker v. Dickson were not satisfied.

Stated in the context of this case, the Brubaker

criteria are: (1) whether the public defender consulted sufficiently with appellee; (2) whether the public defender adequately investigated the facts and the law; (3) whether appellee had a defense which was not presented; and (4) whether the omissions charged to the public defender resulted from inadequate preparation rather than from unwise choices of trial tactics and strategy. See 310 F.2d at 32.

Before turning to consideration of these criteria, it is important to recognize certain fundamental factors concerning this case. Appellee's conviction rests upon a plea of guilty personally entered. There was no trial. Appellee gave the police a signed, full confession. The public defender was appointed prior to the preliminary examination stage in the proceedings against appellee. The preliminary examination was waived with the public defender present. The public defender was present also at appellee's plea and sentencing. The only records of the proceedings consist of summary minute entries relative to proceedings in the justice court, together with the reporter's verbatim transcript of the proceedings in the superior court during plea and sentence. The proceedings now complained of occurred almost seven years ago.

The precise issue before the District Court was

whether appellee was denied his constitutional right to counsel by the alleged failure of the public defender to consult at all with him. This issue was properly framed on the one hand, by appellee's allegations that there was absolutely no representation or consultation, and on the other hand, by both the testimony of the public defender as to his customary and invariable procedure in criminal cases, and the state court records. Against this background, we turn to consideration of the case in light of the Brubaker criteria.

(1) Did the public defender consult sufficiently with the accused?

The District Court answered this question in the negative:

> "It is perfectly obvious from the record that there was little or no consultation. Petitioner, of course, testifies that there was no consultation. This Court is inclined to believe that petitioner's testimony in this regard is substantially truthful." (CT 109).

This conclusion is neither supported by the record nor is it consistent with other findings by the District Court.

Appellee made no allegations attacking the sufficiency or quality of consultation received from the

public defender. Instead, he declared categorically that he had never consulted with the public defender, and that he had never seen him prior to the time of sentencing, which he identified as the first moment he understood himself to be represented by counsel (CT 4, 5, 16, 39, 56, 64, 65; RT 23, 26-27).

Early in its opinion the District Court declared that if the public defender had indeed followed his declared procedure in appellee's case, appellee would likely have been afforded effective representation (CT 102). But the court then observed that the public defender could not testify with any certainty that his procedure was actually followed in appellee's case (CT 102-03). This was error.

The public defender clearly and emphatically declared that his customary procedure was followed invariably and that there was no question in his mind but that it was followed in appellee's case (RT 73-74, 82-83).

But in addition, the District Court rejected the contention, fundamental to appellee's case, that he never consulted with the public defender, finding that "it seems clear that some consultation must have occurred." This finding was based upon the court's recognition that appellee and his codefendants pleaded guilty without

hesitation and were obviously not surprised that they were going to be sentenced without trial (CT 103).

Having thus found appellee impeached in such an important respect, the District Court nevertheless continued the inquiry by substituting what it characterized as the "crucial question," namely, whether the public defender had informed appellee what pleading guilty implied (CT 103). The court then concluded that the public defender did not adequately advise appellee of the consequences of a guilty plea. This conclusion was apparently based upon the following speculation:

> "It is difficult to conceive of petitioner desiring to plead guilty and be sentenced immediately after he had been told by the judge that there was no possibility for probation . . . and that the term prescribed by law was five years to life, unless he believed he was going to be sent back to the Youth Authority." (CT 104).

One thing is clear from appellee's allegations: whatever favorable treatment he allegedly was to receive was also to be received by his two codefendants (RT 22, 44:5-18). All three defendants had only shortly before been denied juvenile treatment by the same judge they faced at sentencing (CT 15-17). Appellee was the last of the

three to be sentenced, thus he must have been aware that the sentence to be imposed was not a return to the Youth Authority. Appellee was not stupid (RT 111-12). Finally, it should not be overlooked that appellee, who by his own account, had shown little respect for, or fear of, the same judge earlier (RT 15-17), made no objection or comment when he and his two codefendants were sentenced to state prison, even though he now claims he knew then that he was being "railroaded" (RT 39). Nor did appellee make any complaint after commencing his term of sentence.

The District Court also erroneously relied upon the silence of the record:

> "Moreover, there is absolutely nothing in the record to show any attempt was made to bring home to petitioner the seriousness of his predicament and the consequences that might result from the waivers he was presumably advised to enter." (CT 106).

It would be unusual if there was something of this sort in the record. The District Court here demanded to know the content of consultation occurring over six years ago. Certainly no court records would chronicle such consultation. And after the passage of six years it could hardly be expected of a busy attorney that he

independently recall the details of his consultation with any particular criminal defendant he had represented. Counsel's inability to independently recall the case is attributable at least in part to appellee's delay in presenting this petition. Appellee, after his conviction in 1958, never gave his attorney occasion to reexamine the case until 1965. The absence of such evidence constitutes exactly no evidence. It cannot serve to satisfy appellee's burden of proof unless habeas petitioners are to be rewarded for unreasonable delay.

Appellee alleges that the public defender never consulted with him, not that the consultation was constitutionally defective for its failure to include an apprisal of the seriousness of his predicament and the consequences of a guilty plea (see, e.g., CT 56:7-17). Appellee's allegation was found false by the District Court. There was no justification for the court's further inquiry into an issue not raised by appellee and there was no evidence to support the District Court's findings.

(2) Did the public defender adequately investigate the facts and the law?

The District Court answered this question in the negative also (CT 109). Once again, however, the court apparently fashioned affirmative evidence favorable to appellee's contentions from silence in the record. The

court declared:

> "There is absolutely nothing in the record to indicate that any investigation into the facts was undertaken by the Public Defender. . . . Moreover, there is no showing in the record that the Public Defender interviewed any of the youths involved in the offense. . . . " (CT 109).
>
> "There is nothing in the record to indicate the depth of the Public Defender's research into the law of the offense." (CT 110).

It was the public defender's clear and emphatic testimony that in every case he handled he interviewed the suspects individually prior to the preliminary examination (RT 82-83). He described these interviews as consisting of a discussion of the truth of the allegations contained in the complaint, ascertainment of the suspect's story, and consequently, the facts known by the suspect, and a discussion of the plea and the functions of the preliminary examination (RT 73-74).

Absent any independent recollection by the public defender, there could be no indication in the record as to what investigation into the facts was undertaken in appellee's case. Traditionally, facts obtained

from a defendant by his attorney at the pretrial stage have been privileged, and therefore not disclosed. Likewise, there could be nothing in the record to indicate the "depth" of the public defender's research into the law of the offense. Attorneys make no such pronouncements for the benefit of the court record in such proceedings as those here involved. Indeed, speculation concerning the depth of a public defender's research into the law of armed robbery, when that public defender had served in that capacity for approximately four years, during which time he represented approximately 120 defendants a year (RT 88-89), seems hardly appropriate.

The District Court also declared:

> "There is clear unrefuted testimony by petitioner that even though he had requested an earlier interview, the Public Defender was not summoned to consult with petitioner prior to the day the preliminary examination was scheduled to be held." (CT 109).

The record in fact refutes this declaration. Appellee steadfastly maintained that the public defender never consulted with him, and that in fact he never saw the public defender until the time of sentencing (RT 20, 23-24, 38). In fact, the preliminary examination was originally scheduled to be held on September 16, 1958

(CT 28, 67, 82). But prior to that date, on September 11, appellee appeared with the public defender and waived that preliminary examination. Ibid. The public defender testified that such a change of date for the purpose of waiver of the scheduled preliminary examination could only have been initiated by him (RT 75-77). And he declared that such a court date for waiver of preliminary examination could only have been the result of his discussing the charges with appellee, and appellee's acknowledgement of guilt and desire to proceed accordingly (RT 75-77, 82-83).

It is no answer to this second criterion furnished by Brubaker to question the public defender's familiarity with the facts or law relative to the question of post-conviction treatment (see CT 104-05, 110).[1/] The irrefutable fact remains that appellee's sole allegation concerning representation by the public defender was that he never was consulted by him, and was not represented by him until sentencing. The District Court's speculation concerning the quality, nature, and "depth" of the consultation and investigation was therefore unwarranted.

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1. The District Court's erroneous reliance on matters relating solely to post-conviction treatment as a basis for issuance of the writ is discussed in Argument II, infra.

(3) Did appellee have a defense which was not presented?

The District Court's answer to this question is necessarily unclear since appellee at no time claimed to have had any specific defense. Thus, the court speculated:

> "Whether petitioner had a complete defense does not show in the record. There may, however, have been a partial defense. . . . Although petitioner admitted to the Merced Police that he and his codefendants were armed with a 'pistol' or a 'gun' . . . there is no evidence in the record to show whether the statement to the police was correct, whether it was admissible, whether the firearms in question were loaded or if unloaded could be used in such a manner as to be considered as deadly or dangerous." (CT 108).

The record does show that appellee made the statement, read it, and attested to its veracity (CT 95; RT 41-42). Appellee has never alleged any complete defense to the crime charged, much less that he had any partial defense based upon an argument that the gun with which he was admittedly armed was not a

dangerous or deadly weapon.[2] The court raised the question sua sponte.

Again, there were no sufficient allegations and certainly no positive evidence developed at the hearing to warrant the apparent conclusion of the District Court relative to this criterion.

(4) Were the omissions of the public defender the result of inadequate preparation rather than from unwise choices of trial tactics and strategy?

Just as the District Court erroneously concluded that the silence of the record in certain respects constituted "omissions" of the public defender, so it again relied upon the silence of the record to answer the final Brubaker criterion in the negative. Thus, the court declared:

> "It is the conclusion of this Court that there is nothing in the record to indicate that the omissions heretofore discussed resulted from unwise choices of trial tactics

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2. This argument would have been specious under California law. See, e.g., People v. Anderson, 236 A.C.A. 443, 455-56, 46 Cal.Rptr. ___, ___ (1965); People v. Ekstrand, 28 Cal.App.2d 1, 7, 81 P.2d 1045, 1047-48 (1938); People v. Raner, 86 Cal.App.2d 107, 194 P.2d 37 (1948); People v. Coleman, 53 Cal. App.2d 18, 28-29, 127 P.2d 309, 315-16 (1942); People v. Ward, 84 Cal.App.2d 357, 360, 190 P.2d 972, 974 (1948).

and strategy." (CT 110).

On the contrary, the record does reveal a sound and understandable basis for the procedure indicated by the state court records: Appellee and his codefendants were apprehended shortly after commission of the crime charged. They were arrested in a stolen car. Appellee then gave a full, signed confession to the police. There was an available eye-witness to the crime (CT 95; RT 13, 32, 37, 41-42). At the time, appellee was a parolee from the Youth Authority. He was anxious to plead guilty, waive time for probation and be sentenced (CT 91-92). He never asserted his innocence. Nor has he specifically alleged any defenses to the crime to which he pleaded guilty. Moreover, although the matters now complained of were allegedly known to appellee at the time of his sentencing, he made no complaint at that time, nor did he communicate any complaint to anyone until seven years later by proceedings in habeas corpus (RT 38-39).

Relative to the representation afforded appellee up through his plea of guilty, the only "omissions" consist of silences in the record. That the public defender failed to have any independent recollection of events seven years past should provide no basis for the conclusion that there was constitutionally inadequate representation.

Where, as here, appellee entered a guilty plea and at no time alleged his innocence, it seems hardly appropriate to make an inquiry in terms of "trial tactics and strategy." The District Court erroneously answered this final Brubaker criterion also.

B. The criteria set forth in Brubaker v. Dickson were inappropriately applied in this case.

In Brubaker, this Court considered allegations that a public defender had failed to investigate a plainly evident defense of diminished responsibility and had thus deprived the petitioner there of effective representation. Upon consideration of detailed and well documented allegations, not refuted by the record, this Court held only that the petitioner was entitled to an evidentiary hearing in the District Court on the issue of competence of counsel. 310 F.2d at 38-39.

Several significant differences exist between Brubaker and this case. In Brubaker there had been a trial. Consequently, there was a transcript reflecting the public defender's procedure on the petitioner's behalf prior to conviction. See 310 F.2d at 36-37. Here there was no trial, but a plea of guilty, and as a consequence, it was expectable that there would be no record of the public defender's conduct on behalf of

appellee prior to his conviction.

In Brubaker, the petitioner presented the court with detailed factual allegations in support of his contention. He supported his allegations with medical records, competent medical opinion, and supporting affidavits. See 310 F.2d at 33-35. Here, appellee made no such detailed and specific allegations. He went no further than to simply state his conclusion that "he believed he had a good defense." (CT 12). He did not mention this in his final affidavit (CT 63-66). Neither did he elaborate upon the point, nor did he indicate how he was deprived of any available defense to the crime charged. By personally entering a plea of guilty to the crime charged appellee admitted every element thereof. Nowhere does he contend that his plea was entered as a result of improper representation by the public defender.

This Court in Brubaker addressed itself to the question whether petitioner's detailed allegations established a prima facie case, requiring an evidentiary hearing. Here, the District Court was bound to sustain the conviction unless it found appellee's contentions proven by a preponderance of the evidence. The District Court failed to recognize that the burden of proof was higher and the allegations and testimonial evidence much

less than in Brubaker.

In cases such as this one, where the defendant personally enters a plea of guilty; where the records indicate that he was represented by counsel from the preliminary examination stage through sentencing; where counsel declares his custom invariably to have been to discuss the case with his client prior to preliminary examination; where the defendant's only contention is that the public defender never consulted with him; and where that allegation is rejected by the court, the inquiries framed by this Court for use under the circumstances in Brubaker v. Dickson, supra, are entirely inappropriate. Consequently, in characterizing appellee's case so as to bring the inquiries framed by Brubaker to bear, the District Court erred.

C. The record compels the denial of appellee's petition for habeas corpus.

Appellant fully recognizes that the constitutional requirement of representation by counsel is one of substance, not of form, and cannot be satisfied by a pro forma or token appearance. See, e.g., Avery v. Alabama, 308 U.S. 444, 446 (1940); People v. Chesser, 29 Cal.2d 815, 823, 178 P.2d 761, 764 (1947). But when the challenge to the effectiveness of representation is made relative to conduct of a trial, the rule is well settled

that the conviction will not be set aside on the grounds that counsel was incompetent unless the representation was such as to make the trial a farce and mockery of justice, shocking to the conscience of the court. See, e.g., Washington v. United States, 297 F.2d 342 (9th Cir. 1961); Taylor v. United States, 238 F.2d 409, 413-14 (9th Cir. 1956).[3/]

Furthermore, it is crucial to recall that "when collaterally attacked, the judgment of a court carries with it a presumption of regularity." Johnson v. Zerbst, 304 U.S. 458, 468 (1938). And the burden of proof rests upon appellee, who would establish that the representation afforded him was constitutionally inadequate. Cf. Johnson v. Zerbst, supra; Moore v. Michigan, 355 U.S. 155, 161-62 (1957). If appellee would overturn his conviction, based upon a plea of guilty while represented by counsel, he must allege and prove lack

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3. It is highly significant that cases involving the issue of effective representation are almost unanimously concerned with trial situations. Those cases which do involve guilty pleas and consequently no trial, present clear and undisputed evidence of a complete lack of any consultation or representation by counsel. See, e.g., People v. Chesser, supra. Appellee sought to bring his allegations within this framework. But the District Court found that the allegation that there had been absolutely no consultation or representation was false (CT 103).

of adequate representation by a preponderance of the evidence. That burden cannot be affirmatively met by an absence of specific allegations or a silence of the record.

The burden is on appellee to show in addition that the allegedly inadequate representation afforded him by the public defender related to, and therefore warrants the setting aside of, his conviction. See Turner v. Maryland, 318 F.2d 852 (4th Cir. 1963). The lesson of the Turner case is applicable here. There, counsel was appointed two weeks prior to the trial, but did not consult with the defendant until less than one-half hour prior to trial. After declaring that it could not condone such methods, the Court of Appeals for the Fourth Circuit declared:

> "Normally, in the absence of clear proof that no prejudice resulted, we should be obliged to treat the lawyer's representation as inadequate and the trial as falling short of the standards of due process guaranteed by the Fourteenth Amendment." 318 F.2d at 854.

However, the Court of Appeals recognized that the evidentiary hearing before the District Court established that the defendant had no information helpful to his defense

Upon a proper judicial inquiry, related as it must be to appellee's allegations, this record compels the conclusion that appellee failed to carry his burden of proof.

II

THE DISTRICT COURT ERRED IN ORDERING APPELLEE'S DISCHARGE FROM CUSTODY.

As demonstrated in Argument I, there is no support in the record for a conclusion that appellee's conviction, namely, the guilty plea, resulted from ineffective aid of counsel.

However, in declaring that appellee's conviction must be invalidated, the District Court focused its attention upon the conduct of the public defender as it related to the sentence appellee received (CT 104-05, 109).

The District Court properly recognized that matters of probation and sentence are properly questions of state law (CT 107). Nevertheless, it examined the proceedings relative to probation and concluded:

"The Public Defender had not adequately

researched the applicable law and petitioner's circumstances at the time of sentencing." (CT 104).[4/]

The District Court seized particularly upon the failure of the public defender to argue strenuously on behalf of probation for appellee (CT 104-05). But the position taken by the public defender was by no means indefensible. The law of this state indeed allows that probation be granted upon conviction for armed robbery. Pen. Code § 1203. However, although probation is not absolutely prohibited in such cases, legislative policy is against it, and it may be granted only in unusual cases. In 1958, as now, Penal Code section 1203 provided in pertinent part:

"The Legislature hereby expresses the

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4. The District Court undercut this conclusion later in the opinion:

> "So far as the post-conviction law was concerned, the record is ambiguous as to whether the Public Defender was misinformed as the possibility for probation and the implications of a sentence to the Department of Corrections rather than the Youth Authority." (CT 110) (Emphasis added.)

Certainly, any "ambiguity" which may have characterized the public defender's conduct relative to the post-conviction proceedings was not such a clear indication of inadequate representation as to infect the prior proceedings.

policy of the people of the State of California to be that, except in unusual cases where the interest of justice demands a departure from the declared policy, no judge shall grant probation to any person who shall have been convicted of [armed] robbery. . . ."

The public defender asserted that he was aware of this provision at the time of sentencing (RT 100).

Of course, appellee has never suggested how his case was unusual or how the interests of justice demanded a departure from the declared policy so as to make probation available to him. On the contrary, the facts precluded any such showing. The superior court judge had only days earlier declared appellee unfit for treatment as a juvenile (CT 87-88). As a consequence, the judge was also familiar with the unfavorable report filed by the probation officer in the juvenile proceedings (CT 85-86, 92:24-25; RT 81-82). Finally, appellee acknowledged prior to sentencing that he was a parole violator from the Youth Authority, having been committed to the Youth Authority as an incorrigible (CT 91-92). Appellee fails to show how the complained of representation afforded him during post-conviction proceedings operated to deny him fundamental fairness. He thus fails to

sustain his burden of proof. Cf. Turner v. Maryland, 318 F.2d 852 (4th Cir. 1963).

Appellant recognizes that the conduct of counsel at any stage of the proceedings can be considered insofar as it might tend to show the nature of the representation afforded in the proceedings leading to conviction. However, it should be clear that inadequate assistance rendered relative to post-conviction treatment will not serve of itself to invalidate the conviction.

Thus, even if the District Court properly could have concluded that the assistance rendered by the public defender on September 15 relative to the question of sentence or probation was constitutionally inadequate, this could not completely undermine the conviction based upon appellee's guilty plea. In no event can a discharge from custody be justified, only a remand for a new probation hearing.

Section 2243 of Title 28, United States Code provides that after an evidentiary hearing the court must "dispose of the matter as law and justice require." Here law and justice can require no more than a new hearing in the state court limited to determining whether probation should be granted. Certainly the evidence before the District Court did not justify its order invalidating

appellee's conviction and ordering his discharge from custody.

CONCLUSION

This case clearly demonstrates the problems inherent in habeas corpus proceedings initiated several years after conviction, where conviction is based upon a guilty plea while represented by counsel. By the very nature of the allegation, namely, inadequate representation, the court records will ordinarily fail to afford any direct evidence. Consequently, the court is left to resolve the conflict which will arise between the unrestrained allegations of the petitioner on one side, and the testimony of counsel understandably limited by passage of time to general or customary procedure, on the other.

Surely, not every felon convicted upon a plea of guilty while represented by counsel is entitled to an evidentiary hearing to test his accusations against the recollection of the attorney who represented him, possibly many years earlier. The courts have recognized that attempts to try former

counsel should be critically examined.[5]

A careful examination of appellee's allegations here, especially when contrasted with the record, compels the conclusion that he has not and indeed cannot satisfy his burden of proof. He has not shown by a preponderance of the evidence that he was denied fundamental fairness by the representation afforded him in the state court proceedings culminating in his guilty plea to the charge of armed robbery.

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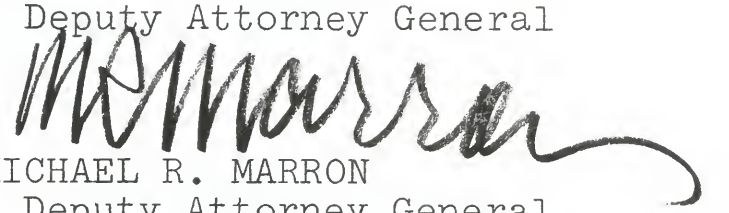
5. "It is well known that the drafting of petitions for habeas corpus has become a game in many penal institutions. Convicts are not subject to the deterrents of prosecution for perjury and contempt of court which affect ordinary litigants. The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. In many cases there is no written transcript and so he has a clear field for the exercise of his imagination. He may realize that his allegations will not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down. To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of that phrase is to give every convict the privilege of opening a Pandora's box of accusations which trial courts near large penal institutions would be compelled to hear." Diggs v. Welch, 148 F.2d 667, 669-70 (D.C. Cir. 1945); see Hodge v. Heinze, 165 F.Supp. 726 (N.D. Calif. 1958); Brubaker v. Dickson, 310 F.2d 30, 39 (9th Cir. 1962); see also Comment, Incompetence of Counsel as a Ground for Attacking Criminal Convictions in California and Federal Courts, 4 U.C.L.A. L.Rev. 400, 402-03 (1957).

For the reasons stated, the order granting the writ of habeas corpus and ordering appellee's discharge should be reversed.

DATED: September 21, 1965

THOMAS C. LYNCH, Attorney General
of the State of California

ROBERT R. GRANUCCI
Deputy Attorney General



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Attorneys for Respondent-Appellant.

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CR-SF
64-1508

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that in my opinion this brief is in full compliance with these rules.

DATED: San Francisco, California

September 21, 1965

MICHAEL R. MARRON
Deputy Attorney General
of the State of California

No. 20245

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20245

ATLANTIC NATIONAL INSURANCE CO.,
a Florida corporation, Appellant

v.

CALIFORNIA STATE AUTO ASSOCIATION
INTERINSURANCE BUREAU, a California
corporation; SAMUEL ROTANZI; and
EDGAR T. WEEKES and CATHERINE H.
WEEKES, husband and wife, Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLANT
ATLANTIC NATIONAL INSURANCE CO.

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Attorneys for Appellant
Atlantic National Insurance Co.

I N D E X

I N D E X (Con't)

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No. 20245

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ATLANTIC NATIONAL INSURANCE CO., a Florida corporation, Appellant, v. CALIFORNIA STATE AUTO ASSOCIATION INTERINSURANCE BUREAU, a California corporation; SAMUEL ROTANZI; and EDGAR T. WEEKES and CATHERINE H. WEEKES, husband and wife, Appellees.	APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLANT
ATLANTIC NATIONAL INSURANCE CO.

Jurisdiction

This is an Appeal from a Judgment entered in an action for declaratory relief brought by ATLANTIC NATIONAL INSURANCE CO., a Florida corporation (hereinafter called "Atlantic"),

against CALIFORNIA STATE AUTO ASSOCIATION INTERINSURANCE BUREAU, a California corporation (hereinafter called the "Bureau") and SAMUEL ROTANZI, a resident and citizen of the State of California (hereinafter called "Rotanzi") and EDGAR T. WEEKES and CATHERINE H. WEEKES, husband and wife, residents and citizens of the State of Arizona (hereinafter called the "Weekes"). (Civil Cause No. 4906.)

By its Complaint Atlantic sought a declaratory judgment regarding the coverage, order, and limits of its contractual obligations with respect to Rotanzi and the Bureau. 28 U.S.C. § 2201.

Jurisdiction of the District Court was based on diversity of citizenship and a matter in controversy involving more than $10,000.00, exclusive of costs and interest. 28 U.S.C. § 1332.

All parties to the action moved for summary judgment (T.R.*32, 36, 61),and on

*/ The abbreviation "T.R." denotes Transcript of Record.

May 13, 1965, Judgment was entered (T.R. 78-79). Notice of Appeal from the Court's Judgment was filed by Atlantic on the 11th day of June, 1965 (T.R. 84). Commencement of the appeal and all further procedures followed by appellant in prosecuting it have been pursuant to Rules 73 through 76 of the Federal Rules of Civil Procedure. This Court has jurisdiction to entertain the appeal under authority of 28 U.S.C. § 1291.

Statement of the Case

Following a collision between an automobile driven by Edgar T. Weekes and one driven by Rotanzi (which he had leased from the Hertz Corporation), the Weekes initiated an action for personal injuries in the United States District Court, District of Arizona, against Rotanzi (Civil Cause No. 3742).

At the time of the accident, there was in force a policy of driverless car liability insurance issued by Atlantic in favor of the Hertz Corporation, under which Rotanzi was an insured. There was also in force an automobile liability policy issued by the Bureau in favor of Rotanzi.

The policy issued by Atlantic provides, in applicable part:

> The insurance under this policy shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under another policy or otherwise.

The policy issued by the Bureau provides in part:

> If the insured has other insurance against the loss covered by Part I of this policy the Bureau shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance.

The Weekes subsequently commenced a second action against Rotanzi in the Superior Court of the State of Arizona in and for the County of Maricopa for property damages arising out of the same accident. (Cause No. 148506.) The latter action was dismissed with prejudice pursuant to stipulation of the parties.

As a result of the provisions of the two insurance policies and the dismissal of the State Court action, Atlantic sought the following declaratory relief: 1) the effect of the Stipulation and Order of Dismissal with Prejudice, of the action brought in State Court by Weekes against Rotanzi, on the action brought by Weekes against Rotanzi in Federal District Court; 2) its liabilities and obligations under the policy of automobile liability insurance issued by it which was alleged to afford only excess insurance to Rotanzi; and 3) the liabilities

and obligations of Bureau under a policy of insurance issued by it which was alleged to afford primary insurance coverage to Rotanzi.

The District Court entered its Judgment, in effect holding that the Stipulation of Dismissal with Prejudice in the Weekes' action against Rotanzi in State Court does not bar the action by Weekes against Rotanzi in Federal Court; that Atlantic's policy of insurance is primary insurance with respect to Rotanzi; and that the Bureau's policy of insurance is excess with respect to Rotanzi.

The legal questions involved in this appeal are:

1. Whether the dismissal with prejudice of the action in State Court bars the Weekes from maintaining the action in Federal Court; and, if not,

2. What the contractual obligations of the insurers are where both purport to afford only excess coverage.

coverage provision, the insurers should prorate the obligations incurred under their contractual obligations.

IV.

The District Court erred in entering Paragraph 2(D) of the Judgment for the reasons:

(a) The policy issued by the Bureau contains an ambiguous clause with respect to whether it provides pro rata or excess coverage which should, therefore, be treated as a pro rata clause, in which case the Bureau's obligation is primary and Atlantic's obligation is that of excess coverage.

(b) In the event the Bureau's policy is construed to be excess coverage only, both policies are then excess and the insurers should prorate the obligations incurred under their contracts.

SUMMARY OF ARGUMENT

I.

Atlantic National Insurance Co., an insurer of Rotanzi, submits that it is not obligated to defend Rotanzi in the action for personal injuries brought by the Weekes in Federal District Court because the Weekes are not entitled to continue the suit against Rotanzi.

As a result of one automobile accident the Weekes brought two actions against Rotanzi, one for personal injuries (in Federal District Court) and one for property damage (in State Court). The latter action was dismissed with prejudice. Arizona follows the single cause of action rule, which prohibits the splitting of a single cause of action into separate suits for various elements of damage. The effect of the Rule is such that where a cause of action is split,

a judgment rendered in the first action to be tried bars the claimant from maintaining the untried action.

There was no fraud in connection with the dismissal with prejudice entered in the State action.

An exception to the single cause of action rule where a defendant consents to the splitting of a single cause of action (by his failure to object) which permits a plaintiff to continue both suits is not applicable because the exception is limited to cases wherein judgment is rendered for plaintiff. It is not applicable where judgment is rendered for defendant, as was the case in the suit between the Weekes and Rotanzi.

The lower court erred in holding that the judgment of dismissal with prejudice in the State Court action does not bar the suit pending in Federal District Court.

II.

Both Atlantic and the Bureau have issued policies of insurance which afford coverage to Rotanzi.

Atlantic's policy contains an excess insurance clause.

The Bureau's policy contains a combination pro rata and excess coverage clause which is ambiguous and should be construed against the Bureau; that is, the pro rata clause should be given effect over the excess clause.

If so construed, the Bureau's pro rata clause makes it the primary insurer and Atlantic the excess insurer.

In the alternative, if the Bureau's policy is not ambiguous, both policies contain valid excess provisions. When both policies are excess the courts prorate liability according to the coverage provided.

The lower court erred in holding that

Atlantic was the primary insurer and that the Bureau's liability was only that of excess coverage.

ARGUMENT

I.

WHEN TWO SEPARATE ACTIONS ARE INITIATED, ONE FOR PERSONAL INJURIES AND THE OTHER FOR PROPERTY DAMAGE, BOTH ARISING OUT OF THE SAME ACCIDENT, A DISMISSAL WITH PREJUDICE OF ONE OF THE ACTIONS ACTS AS A BAR TO THE MAINTENANCE OF THE OTHER ACTION

A. Arizona Single Cause of Action Rule and the Reason Therefor

The rule in Arizona is that injuries to the person and to his property which result from the same tort constitutes one and only one cause of action. The single cause of action rule was first adopted by the Supreme Court of Arizona in the case of Jenkins v. Skelton, 21 Ariz. 663, 192 Pac. 249 (1920), and the Court has continued to follow it whenever the issue has been raised. See Daniel v. City of Tucson, 52 Ariz. 142, 79

P.2d 516 (1938); State v. Airesearch Mfg. Co., Inc., 68 Ariz. 342, 206 P.2d 562 (1949); Malta v. Phoenix Title & Trust Co., 76 Ariz. 116, 259 P.2d 554 (1953).

The primary reason given by the Court for adopting the rule is that a plaintiff should not be permitted to split his claim and harrass an adversary with more than one action for one wrong. Ibid. In support of the rule, the Arizona Court takes the position that the rule reflects the principle that a cause of action inheres in the causative aspect of a breach of legal duty--that is, the wrongful act itself--and not in the various forms of harm which flow therefrom. See Jenkins v. Skelton, supra.

In Jenkins the Court said:

> We quote from Mobile etc. Ry. v. Matthews . . . [115 Tenn. 172, 91 S.W. 194] as being expressive of the views of the courts holding that the negligent act constitutes but one cause of action where injury to both person and property of a party is inflicted at the same time.

"The negligent action of the plaintiff in error constitutes but one tort. The injuries to the person and property of the defendant in error were the several results and effects of one wrongful act. A single tort can be the basis of but one action. It is not improper to declare in different counts for damages to the person and property when both result from the same tort, and it is the better practice to do so where there is any difference in the measure of damages, and all the damages sustained must be sued for in one suit. This is necessary to prevent multiplicity of suits, burdensome expense and delays to plaintiffs and vexatious litigation against defendants. If necessary to prevent confusion in ascertaining the damages to be recovered for different injuries, separate verdicts may be directed."

We agree with the reasoning of this case and others that adopt the same view. (Emphasis added.)

21 Ariz. at 667-78
192 Pac. at 251

The Arizona Court's position in this regard is neither unique nor novel and its choice of rule is supported by cases in a majority of jurisdictions.1/

1/ See list of representative cases in Appendix at A-1.

B. Effect of Single Cause of Action Rule

The effect of the single cause of action rule is to bar one who has sustained simultaneous personal injury and property loss from the same cause and who has prosecuted to judgment a suit for either of his two elements of damage from thereafter maintaining an action for the remaining element. See Suttle v. Seely, 94 Ariz. 161, 382 P.2d 570 (1963); Day v. Estate of Wiswall, 93 Ariz. 400, 381 P.2d 217 (1963); O'Neil v. Martin, 66 Ariz. 78, 182 P.2d 939 (1947).

In Day v. Estate of Wiswall, supra, the Arizona Supreme Court said:

> Under the doctrine of res judicata an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive as to every point decided therein, and also as to every point raised by the record which could have been decided, with respect to the parties or their privies, Hoff v. City of Mesa, 86 Ariz. 259, 344 P.2d 1013 (1959). Moreover, if two actions involving the same issues and parties are pending at the same time, when a judgment in one becomes final it may

be raised in bar of the other regardless of which action was begun first, Restatement, Judgments § 43; Alabama Power Co. v. Thompson, 250 Ala. 7, 32 So.2d 759, 9 A.L.R.2d 974 (1947). (Emphasis added.)

93 Ariz. at 402
381 P.2d at 219

Thus, if A and B are involved in an accident and A brings one suit for personal injuries and another for property damage, he is entitled to pursue both actions until final judgment has been rendered in one of them. At that time B may plead the judgment as a bar to the remaining action because the issues have already been decided or because they could have been decided.

C. Dismissal With Prejudice Has Effect of Adjudication On The Merits

A decree of dismissal with prejudice has the same effect as an adjudication on the merits. See Suttle v. Seely, supra; Cochise Hotels, Inc. v. Douglas Hotel Operating Co., 83 Ariz. 40, 316 P.2d 290 (1957); DeGraff v.

Smith, 62 Ariz. 261, 157 P.2d 342 (1945); Wall v. Superior Court, 53 Ariz. 344, 89 P.2d 624 (1939); Roden v. Roden, 29 Ariz. 549, 243 Pac. 413 (1926).

In Suttle v. Seely, Supra, the Court stated the rule as follows:

> A consent judgment entered by stipulation of the parties, is just as valid as a judgment resulting from a trial on the merits, and a decree of dismissal with prejudice made upon that stipulation is a final determination and is res judicata as to all issues that were raised or could have been determined under the pleadings. (Emphasis added.)
>
> 94 Ariz. at 163-64
> 382 P.2d at 572

D. Instant Case

In the instant case, the collision between the Weekes and Rotanzi gave rise to the only cause of action between the parties. The Weekes first brought an action in Federal District Court asking for damages for personal injuries received in the accident. Thereafter

while the first action was pending, the Weekes brought a second action against Rotanzi seeking recovery for damages to their car. The second action was dismissed with prejudice pursuant to a stipulation between the parties.

There was no fraud or collusion in connection with the dismissal--the record before this Court clearly shows that the Weekes, with consent of their counsel in the personal injury action, stipulated to the dismissal with prejudice of their property damage claim at a time when they and their attorneys had full knowledge that Rotanzi intended to rely on the legal effect of such dismissal in the claim pending against him for personal injuries.

Attorneys Langerman and Begam, by Attorney Robert G. Begam, represented the Weekes in the action filed on April 20, 1961, in Federal District Court against Rotanzi for personal injuries. Defendant Rotanzi was

represented by Attorney Jack M. Anderson.

Thereafter, on March 22, 1963, the Weekes, by Attorney William S. Andrews, commenced an action in State Court against Rotanzi for property damages arising out of the same accident. Rotanzi was also represented in the State Court action by Attorney Anderson. Pursuant to Stipulation between Attorneys Andrews and Anderson, an Order was entered dismissing the State Court action with prejudice. Attorney Anderson then caused a settlement draft to be sent to the Weekes through their attorney, Andrews. The draft contained "complete release" language and the Weekes instead of signing it, sent it to Attorney Begam, their attorney in the personal injury litigation, for his review. Attorney Begam advised Attorney Andrews that the draft was not acceptable because of its "complete release" language. (T.R. 46) Attorney Andrews returned the draft to Attorney

Anderson requesting that the "complete release" language be deleted. (T.R. 47)

Attorney Anderson deleted the release language and sent the draft back to Attorney Andrews with the following letter, a copy of which was also sent to Attorney Begam:

. . . .

> I agreed, Bill [Andrews] to pay you and Mr. Weekes the sum of $1,101.52 for a Stipulation dismissing the above captioned matter [Weekes v. Rotanzi - property damage action] with prejudice. . . . 2/
>
> Now, in delivering these funds to you, Bill, I want it clearly understood that we are not in any manner waiving, relinquishing or altering what legal effect, if any, the dismissal of the above-captioned matter may have on your client's action that is pending in Federal Court wherein he is represented by Bob Begam.
>
> If the foregoing is not satisfactory to you and your client, please return the enclosed check to me. We

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2/ It is important to note that the offer was not based on settlement of a part of the claim--it was with respect to obtaining a Dismissal with Prejudice of the property damage action.

> will put the above-captioned cause back on the trial list and try the lawsuit at the earliest opportunity available. (T.R. 48)

Attorney Begam then wrote Attorney Anderson requesting further clarification of his position. (T.R. 49) In response to Attorney Begam's inquiry, Attorney Anderson wrote to Attorney Begam, with a copy to Attorney Andrews:

> There is no mention of subrogation in the Complaint in the above captioned matter. Mr. Weekes is named as a party plaintiff and Bill Andrews indicates in the Complaint that he is attorney as far as the lawsuit is concerned. . . .
>
> I am not asking Mr. Weekes to sign anything. There has already been signed by Bill Andrews, as Mr. Weekes' counsel, a stipulation for dismissal of this case with prejudice. My last letter to Bill was simply to point out that in paying these moneys to Bill and his client, we are fully reserving any effect that the conclusion of this litigation may have on the suits pending in Federal Court. So you see, Bob, I really have nothing to work out with Bill Andrews--either a) he accepts the money and the Stipulation and Order of Dismissal with Prejudice stands, or b) he returns the

money and we try the State action. (T.R. 50)

Attorney Begam then wrote to Attorney Andrews on or about November 6, 1963, with a copy to Attorney Anderson, that he would not let his client, Mr. Weekes, sign anything that would prejudice the Weekes' personal injury claim pending in Federal Court. (T.R. 51-52)

Five days later, on November 11, 1963, without further comment or action by Attorney Anderson, Attorney Begam authorized Mr. Weekes to sign the check, apparently taking the position that a dismissal with prejudice in the State action would have no legal bearing on the action pending in Federal District Court. (T.R. 53)

It is clear from the above correspondence that the Weekes, through their attorneys Messrs. Andrews and Begam, were not deceived in any manner concerning the position that defendant Rotanzi was taking. In two letters

it was made quite clear that Rotanzi was willing to give a draft in return for the Stipulation of Dismissal with Prejudice and that he intended to rely on its legal effect, if any, in the lawsuit then pending in Federal Court. In the alternative, Rotanzi was willing to try the State Court action.3/ Attorney Anderson never attempted to hide his position. The Weekes with advice of both of their attorneys accepted the money on those terms and should now be bound by their election.

The single cause of action rule is in the nature of a restriction on plaintiffs and is designed to protect defendants from being the subject of multiple lawsuits--each for a

---

3/ Plaintiff was not bound to have the State Court action dismissed with prejudice. He clearly could have dismissed the Federal Court action and amended his Complaint in the State Court to include his claim for personal injuries or he could have moved to dismiss the State Court action and amended the Complaint in Federal Court to include his claim for property damage.

different element of damages based on the same cause of action. An analogy is found in the compulsory counterclaim rule which provides a restriction on defendants and is designed to protect plaintiffs from being subjected to a separate lawsuit based on the same cause of action for which plaintiff has brought his claim. See Fed. R. Civ. P. 13(a); Ariz. R. Civ. P. 13(a).

The law is settled in Arizona that a claim which is a compulsory counterclaim under Rule 13 is barred if not pleaded as a counterclaim. See, e.g., Biaett v. Phoenix Title & Trust Co., 70 Ariz. 164, 217 P.2d 923 (1950). There is no requirement that a plaintiff object to defendant's failure to plead the counterclaim before the counterclaim is barred. The results should not be different in cases of multiple actions started by a plaintiff on a single cause of action.

E. Exceptions to Single Cause of Action Rule Not Applicable in Arizona

Notwithstanding the fact that no authority has been found to support an exception to the

single cause of action rule in Arizona, it was urged in the prior proceedings herein that an exception in case of subrogation claims should be made or in the alternative that the Restatement of Judgments provides for an exception to the rule in cases of consent and that such "consent exception" is applicable to the instant case.

a) "Subrogation Exception"

A few states have adopted an exception to the single cause of action rule in cases in which one element of the insured party's damage is the subject of insurance and strict application of the single-cause rule would be prejudicial to the interests of either the insured or the insurer. See, e.g., Underwriters at Lloyd's Ins. Co. v. Vicksburg Traction Co., 63 So. 455 (Miss. 1913); Underwood v. Dooley, 147 S.E. 686 (N.C. 1929). In connection with such cases, it seems sufficient to note that (1) they

do not reflect the Arizona law,[4] (2) they are distinguishable factually in that one of the actions in each such case was brought by the insurer,[5] (3) they are contrary to the

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4/ Jenkins v. Skelton, 21 Ariz. 663, 192 Pac. 249 (1920), adopted the one cause of action rule and to date no exceptions have been made to the rule. It is the obligation of the Federal Court in this case to follow the Arizona law as it exists. See Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

5/ In jurisdictions where the exception has been adopted, one of the prerequisites to its applicability is that it is necessary for conserving the ends of justice. Review of the cited cases shows that such necessity is found only where one suit has been started by the injured party (the insured) and the other by his insurer, and that strict compliance with the rule would preclude one of the parties from his day in court. No case has been found wherein the exception has been applied where both suits were started by the same party (the insured). Although not articulated by the courts, this is apparently true because it is difficult to find an injustice resulting from a decree that a party is bound by the results of one of two suits when he initiated and pursued both suits in his own name. In the instant case, both suits were ostensibly brought by the injured party.

recent trend in this area,[6] and (4) they conflict with the announced purpose of the rule--that is, to prevent multiple actions from being brought against a person who commits but one wrong.[7]

6/ Jurisdictions in which the single cause of action rule has most recently been considered have not recognized an exception to the rule in cases involving insurance companies. See, e.g., Levitt v. Simco Sales Serv. of Penna., Inc., 135 A.2d 910 (Del. 1957); Mims v. Reid, 98 So.2d 498 (Fla. 1957); Coniglio v. Wyoming Valley Fire Ins. Co., 59 N.W.2d 74 (Mich. 1953); Hayward v. State Farm Mut. Auto. Ins. Co., 4 N.W.2d 316 (Minn. 1942); Farmers Ins. Exchange v. Arlt, 61 N.W.2d 429 (N.D. 1953); Saber v. Supplee-Wills-Jones Milk Co., 124 A.2d 620 (Pa. 1956); Mills v. DeWees, 93 S.E.2d 484 (W. Va. 1956) and State Farm Mut. Auto. Ins. Co. v. De Wees, 101 S.E.2d 273 (W. Va. 1957).

7/ If the exception to the rule is recognized, there are few instances in the case of personal injury and property damage where a defendant would not be subject to two suits--one by the injured party and the other by his insurer. No logical reason can be found to support such an exception in a jurisdiction which purports to follow the single cause of action rule. If insurance companies are permitted to have such an exception carved out, it would seem that every litigant should be entitled to the same treatment, which, in effect, does away with the rule.

7/ Footnote (Continued)

As the Court in Levitt v. Simco Sales Service of Penna., Inc., 135 A.2d 910 (Del. 1957), said:

> The argument is frequently advanced that practical considerations require relaxation of that rule in cases like the present; otherwise, it is said, injustice may result to the insured or to the insurer, depending upon which of them gets into court first. As to this argument, several things may be said. In the first place, it may be assumed that the supposed likelihood of injustice has not actually proven to be very significant, else we should expect to find statutes ameliorating that injustice in at least some of those states where the courts have followed the majority rule. In the second place, the minority rule may well work a hardship upon a litigant by compelling him to defend himself twice, simply because his opponent had insurance covering part of his loss. In the third place, the primary reason for the rule against allowing a litigant to retry issues already decided, to-wit, public policy, is certainly as impressive today as it was when . . . [the rule was adopted]; our crowded court calendars suggest the desirability of continuing, rather than relaxing, the policy of forbidding two suits where one will suffice.
>
> 135 A.2d at 912

b) "Consent Exception"

Even assuming that Arizona recognized an exception to its single cause of action rule in cases of consent, based on Section 63 Restatement of Judgments, the theory that defendant Rotanzi consented to the Weekes splitting their cause of action is not applicable, since the exception to splitting a cause on the theory of consent is clearly limited to instances where the defendant consents (by his failure to object) and thereafter a judgment is rendered in favor of plaintiff. Where, however, there is a judgment rendered on the merits in favor of defendant, the plaintiff is not entitled to continue to maintain the other action since the decision in favor of defendant is res judicata as to the issues actually tried and it acts as a bar to those issues in the other action. In Dowdy v. Calvi, 14 Ariz. 148, 125 Pac. 873 (1912), the Court opined, "If

an action pursuing one remedy has been tried in court, he cannot prosecute another suit for the same cause of action, but for a different relief, because the facts constituting the cause of action have been adjudicated."

Any other result completely ignores the concepts of res judicata and leads to irreconcilable conclusions. For example, hypothesize an automobile accident between A and B in which A receives both personal injuries and property damage. A splits his cause of action and B does not object. Thereafter, one of the actions is tried and judgment on the merits is entered for B because he was not at fault. Under the concepts of res judicata, it is futile to permit A to continue the second action since the issue of negligence has already been adjudicated in B's favor. Only if the theory of res judicata is disregarded could A be permitted to continue

the second action. In such event, A might prevail on the second action assuming the requisite finding of negligence is made. Such a result, however, is untenable. For example, it denies A's claim for personal injuries because B is not negligent but at the same time permits A to recover for property damage because B is negligent.

The situation is different under the same facts where A prevails on the merits in the first case based on B's negligence. The question of B's negligence is *res judicata* and, if A can show the requisite injury, it is not unjust to permit recovery in the second action if the consent exception to the single cause of action is recognized.

Section 62, Restatement of Judgments, provides:

> Where a judgment is rendered, whether in favor of the plaintiff or of the defendant, which precludes the plaintiff from thereafter maintaining an action upon the original

> cause of action, he cannot maintain an action upon any part of the original cause of action, although that part of the cause of action was not litigated in the original action, except
>
> . . . .
>
> (c) where the defendant consented to the splitting of the plaintiff's cause of action.

Although the exception to the rule in case of consent is rather loosely worded and does not seem to draw a distinction in cases where judgment is in favor of the defendant, reference to the various comments to the Restatement shows that the exception applies only where judgment has been rendered in favor of the plaintiff.

The comment on subsection (c) reads as follows:

> . . . .
>
> Where the plaintiff brings separate actions based upon different items included in his claim, and in none of the actions does the defendant make the objection that another action is pending based upon the same claim, a judgment for the plaintiff in one of the actions does

> not preclude him from obtaining judgment in the other actions. . . (Emphasis added.)

Both the comment to the Restatement and logical reason show that subsection (c) is not applicable to the instant case since it is only applicable where judgment has been rendered in favor of the plaintiff. In the case in point, plaintiffs (the Weekes) did not obtain a judgment. In the Weekes' first action a judgment of dismissal with prejudice was entered, which judgment acts as an adjudication on the merits in favor of the defendant Rotanzi.

Moreover, despite the general wording of § 62 of the Restatement, the fact that the exception based on consent is dependent on a judgment being entered for the plaintiff is further reflected in the other comments to the Restatement.

In Comment a, a comment on the whole of § 62, it is stated:

. . . .

The rule stated in this section (r. 12) is applicable whether the judgment is for the plaintiff or for the defendant, irrespective of the issues raised in the case, provided only that there the judgment is for the defendant it is upon the merits so stated (r. 1--2, and hence is one which would bar the plaintiff from maintaining another action upon the original cause of action. Bennett v. Settlement Insurance Co., [1924] 2 K.B. [Explain also.]

And (--) if the Settlement provides:

There is valid and final personal judgment to be rendered on the merits in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause of action.
[Explain also.]

Bennett v. Co [--] states:

A is granted in [--], where a valid and final personal judgment is rendered in favor of the plaintiff, he cannot thereafter maintain an action against the defendant on the original cause of action. In such a case, the original cause of action is merged in the judgment. Conversely, where the judgment is in favor of the defendant and not on the merits, the original cause of action is extinguished or judgment terminated for an entry, and the plaintiff is barred from maintaining an action on it.
[Explain also.]

Although it may be just, in jurisdictions recognizing the consent exception, for a defendant, after being found negligent in the first tried cause, to defend himself on the issue of injuries in the second cause, it is inherently unjust and contrary to the principles of law for a defendant, after being found free from negligence in the first tried action, to be required to defend the second action on the same question of negligence. No reasonable argument can be made to support the theory that the consent exception to the single cause of action is applicable without regard to which party judgment is rendered for in the first tried cause. If, as in the instant case, judgment is rendered in favor of the defendant, it is res judicata as to the issue of negligence in the remaining action and acts as a bar to its prosecution.

For the reasons above stated, it is respectfully submitted that the lower court

erred in holding that a judgment of dismissal with prejudice in one of two actions brought on a single cause of action does not bar the remaining action.

II.

THE BUREAU'S POLICY OF INSURANCE IS PRIMARY INSURANCE AND ATLANTIC'S POLICY OF INSURANCE IS EXCESS INSURANCE, OR, IN THE EVENT BOTH AFFORD EXCESS INSURANCE ONLY, COVERAGE SHOULD BE PRORATED

A. Bureau's Policy is Ambiguous

Since Specifications of Error II, III and IV are interrelated they will be considered together.

The decision as to which policy affords primary coverage and which policy affords excess coverage depends upon an interpretation of the applicable provisions of the two policies concerned. Norris v. Pacific Indem. Co., 237 P.2d 666 (Cal. Dist. Ct. App. 1952); Cosmopolitan Mut. Ins. Co. v. Continental

Cas. Co., 147 A.2d 529 (N.J. 1959).

The policy issued by the Bureau contains a provision which reads:

> If the insured has other insurance against the loss covered by part I of this policy the Bureau shall not be liable for a greater portion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance.

That part of the Bureau's provision prior to the term "provided, however" is known in the insurance industry as a "pro rata clause." That portion of the provision following the term "provided, however," when standing alone, is known in the industry as an "excess clause." It is Atlantic's position that the manner in which the two clauses are put together and the manner in which the purported excess clause is worded makes its meaning ambiguous and makes

the provision as a whole subject to two conflicting interpretations.

The Bureau, of course, interprets the clause as limiting the Bureau's liability, when the insured has other insurance, to a pro rata share with the other insurance except when the insured is driving a temporary substitute or non-owned automobile, in which case the Bureau's liability, within its policy limits, is limited to an amount equal to the excess of the total liability which exceeds the total of all other coverage on the insured and the automobile.

For an equally valid, but contrary, interpretation of the clause, it is necessary only to focus on the key words in the provision which identify the insurance referred to in each clause of the provision.

In the first clause the key words are "if the insured has other insurance" and in the second clause the key words are "the

insurance with respect to a temporary substitute automobile or non-owned automobile."

The equally obvious meaning of the provision is that if the insured has other insurance the Bureau will prorate its liability with the other insurance in all cases except when there is insurance with respect to a temporary substitute or non-owned automobile in which case the Bureau considers that insurance (insurance with respect to the temporary substitute automobile) as excess insurance--that is, the insurance that follows the car is excess. Insurance that follows the insured is to be prorated.

The validity of this position is further emphasized when the purported excess clause contained in the Bureau's policy is compared with the excess provision in Atlantic's policy.

The Bureau's provision reads:

> The insurance with respect to a temporary substitute automobile or non-owned automobile shall be excess insurance.

Atlantic's provision reads:

> The insurance under this policy shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under another policy or otherwise.

Another clear indication of the ambiguity of the Bureau's "excess" clause is found within the Bureau's policy. A comparison of the "other insurance" provision of Part IV appearing on page 3 of its policy with the provision in issue evidences the ambiguity of the provision in question.

The "other insurance" clause in Part IV reads:

> With respect to bodily injury to an insured while occupying an automobile not owned by the named insured the insurance hereunder shall apply only as excess insurance over any other similar insurance available to such occupant, and this insurance shall then apply only in the amount by which the applicable limit of liability of this Part exceeds the sum of the applicable limits of liability of all such other insurance.
>
> With respect to bodily injury to

> an insured while occupying or through being struck by an uninsured automobile, if such insured is a named insured under other similar insurance available to him, then the dangers shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the Bureau shall not be liable under this Part for a greater proportion of the applicable limit of liability of this Part than such limit bears to the sum of the applicable limits of liability of this insurance and such other insurance.
>
> Subject to the foregoing paragraphs, if the insured has other similar insurance available to him against a loss covered by this Part, the Bureau shall not be liable under this Part for a greater proportion of such loss than the applicable limit of liability hereunder bears to the total applicable limits of liability of all valid and collectible insurance against such loss.

The provision of the Bureau's policy in issue is clearly susceptible to being construed in more than one way and is, therefore, ambiguous. The ambiguity should be resolved against the issuing insurer. See generally, Norris v. Pacific Indem. Co., supra. The

pro rata provision would, of course, be the more onerous of the two with respect to the insurer and it should, therefore, be the controlling clause.

B. Effectiveness of Pro Rata Clause in Relation to Excess Clause

If the Bureau is deemed to be bound by its pro rata clause and Atlantic by its excess clause, the next question that arises is the effect of each clause on the other.

It is the general rule in those cases which have considered a conflict between an "excess clause" and a "pro rata clause" that the "pro rata clause" is disregarded and the policy containing the "pro rata clause" is treated as "other valid and collectible insurance" within the meaning of the "excess clause." The excess policy, in this instance Atlantic's policy, is then held only for the share of loss which exceeds the full value of the pro rata policy. Norris v. Pacific

Indemnity Co., supra; Speier v. Ayling, 45 A.2d 385 (Pa. 1946); Trinity Universal Ins. Co. v. General Accd. Fire & Life Assur. Corp., 35 N.E.2d 836 (Ohio 1941).

In the case of Speier v. Ayling, supra, the court in determining the effectiveness of conflicting excess v. pro rata clauses said:

> The effectiveness of such excess insurance clause was settled in Grasberger v. Liebert & Obert, Inc., 335 Pa. 491, 6 A.2d 925, 122 A.L.R. 1201, holding that under such a clause the policy did not come into operation until after such other insurance was exhausted. The scope of the one policy was only as to the excess. The scope of the other was for the full liability prorated with other collectible insurance. (Emphasis added.)
>
> 45 A.2d at 388

The same reasoning applies when making an interpretation of the conflicting clauses contained in the two policies in issue before this Court.

C. Result When Both Policies Contain Effective Excess Clauses

If the Bureau's policy is not ambiguous,

effect must be given to the excess provisions in both policies. The terms of these provisions indicate that neither affords coverage, since both purport to be excess insurance. Various courts, when faced with such a conflict have held that both the "other insurance" provisions of the conflicting policies are meaningless and that the policies shall be applied pro rata. See Cosmopolitan Mut. Ins. Co. v. Continental Cas. Co., supra, at 532-34, where the Court said:

> Since both policies extended coverage to the tort liability of the News Company and McCollum, the respective liabilities of the two insurance companies must be determined by the terms of the "other insurance" provisions of those policies. Although expressed in slightly varying language, it is clear that each company intended that if there were other insurance covering the loss its coverage would be "excess," i.e., it would not be subjected to liability until the limits of the other policy has been reached. If literal effect were given to both clauses the result would be

that neither policy covered the loss. Such a result would produce an unintended absurdity which neither party urges.

. . . .

As applied to the facts of the present case, both policies provide that they shall be "excess" insurance. However, it is obvious that there can be no "excess" insurance in the absence of "primary" insurance. Since neither policy by its terms is a policy of "primary" insurance, neither can operate as a policy of "excess" insurance. The "excess" insurance provisions are mutually repugnant, and as against each other are impossible of accomplishment. Each provision becomes inoperative in the same manner that such a provision is inoperative if there is no other insurance available. Therefore, the general coverage of each policy applies and each company is obligated to share in the cost of the settlement and expenses. We think that such a conclusion affords the only rational solution of the present dispute. This view is supported by the following authorities: Continental Casualty Co. v. Buckeye Union Casualty Co., 143 N.E.2d 169 (Ohio Ct. Com. Pleas 1957); Continental Casualty Co. v. St. Paul Mercury Fire & Marine Ins. Co., 163 F.Supp. 325 (D.C.S.D. Fla. 1958); Employers Liability Assurance Corp. v. Pacific Employers Ins. Co., 102 Cal.App.2d 188, 227 P.2d 53 (D.C.App. 1951); Oregon Auto Ins. Co. v. United States Fidelity & Guaranty Co., supra; Weddell v. Road Transport & Gen. Ins. Co., [1932] 2 K.B. 563, Cf. Zurich General Accident & Liability Ins.

Co. v. Clamor, supra. See also Note, 38 Minn.L.Rev. 838 (1954); 26 S.Cal. L.Rev. 331 (1953); 55 Harv.L.Rev. 1218 (1942).

See also, Arditi v. Massachusetts Bonding & Ins. Co., 315 S.W.2d 736 (Mo. 1958); Athey v. Netherlands Ins. Co., 19 Cal.Rptr. 89 (1962); American Motorists Ins. Co. v. Underwriters at Lloyd's London, 36 Cal.Rptr. 301.

In American Motorists Ins. Co. v. Underwriters at Lloyd's London, supra, the Court said:

> Since both . . . purport to be excess insurance over the other thus creating a situation impossible of literal resolution, the authorities hold that the two insurers prorate the loss in the proportion that their respective policy limits bear to each other.

CONCLUSION

The judgment of the lower court should be vacated and reversed with directions to enter judgment for plaintiff as prayed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We certify that in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in our opinion, the foregoing brief is in full compliance with those rules.

Mark Wilmer

Larry L. Vickrey

A P P E N D I X

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Appendix -- A

APPENDIX NO. 1

See, e.g.,

Alabama: Birmingham S. Ry. Co. v. Lintner, 38 So. 363 (Ala. 1904);

California: Kidd v. Hillman, 58 P.2d 662 (Cal. 1936);

Connecticut: Seger v. Barkhamsted, 22 Conn. 290 (1853);

Delaware: Levitt v. Simco Sales Serv. of Penna., Inc., 135 A.2d 910 (Del. 1957);

Florida: Mims v. Reid, 98 So.2d 498 (Fla. 1957);

Georgia: Bennett v. Dove, 90 S.E.2d 601 (Ga. 1955);

Iowa: Van Wie v. U.S., 77 F.Supp. 22 (N.D. Iowa 1948);

Kansas: Fiscus v. Kansas City Public Serv. Co., 112 P.2d 83 (Kan. 1941)

Kentucky: Travelers Indem. Co. v. Moore, 201 S.W.2d 7 (Ky. 1947);

Louisiana: Fortenberry v. Clay, 68 So.2d 133 (La.App. 1953);

Maine: Pillsbury v. Kesslem Shoe Co., 7 A.2d 898 (Me. 1939);

Maryland: Baltimore & O. Ry. Co. v. Ritchie, 31 Md. 191 (1869);

Massachusetts: Pontiff v. Alexander,
70 N.E.2d 5 (Mass. 1946);

Michigan: Coniglio v. Wyoming Valley
Fire Ins. Co.
59 N.W.2d 74 (Mich. 1953);

Minnesota: Hayward v. State Farm Mut.
Auto. Ins. Co.,
4 N.W.2d 316 (Minn. 1942);

Mississippi: Farmer v. Union Ins. Co.,
111 So. 584 (Miss. 1927);

Missouri: Silent Automatic Sales Corp.
v. Stayton,
45 F.2d 476 (8th Cir. 1930);

North Carolina: Reid v. Holden,
88 S.E.2d 125 (N.C. 1955);

North Dakota: Farmers Ins. Exchange v. Arlt,
61 N.W.2d 429 (N.D. 1953);

Ohio: Rush v. Maple Heights,
147 N.E.2d 599 (Ohio 1958);

Oklahoma: Stanley v. Sweet,
214 P.2d 906 (Okla. 1950);

Pennsylvania: Saber v. Supplee-Wills-Jones
Milk Co.,
124 A.2d 620 (Pa. 1956);

South Carolina: Powers v. Calvert Fire Ins. Co.,
57 S.E.2d 638 (S.C. 1950);

South Dakota: Boos v. Claude,
9 N.W.2d 262 (S.D. 1943);

Tennessee: Globe & Rutgers Fire Ins. Co.
v. Cleveland,
34 S.W.2d 1059 (Tenn. 1931);